Jasbir Singh a/l Dharam Singh v Gurmeet Singh a/p Mahinder Singh & Anor

HIGH COURT (TAIPING) — CIVIL SUIT NO S22NCVC-9–03 OF 2013
MOHAMED ZAINI MAZLAN JC
15 JUNE 2015

Probate and administration — Administration — Administration action — Deceased executed will and bequeathed property to nephew — Nephew submitted application for grant of probate — Grant of probate allowed but could not be issued — Deceased's wife made application for letter of administration pertaining property and transferred property to her name — Whether deceased's wife knew of will — Whether nephew's right over property prevailed over right of deceased's wife

The plaintiff was the first defendant's nephew. The deceased, his uncle ('Mohan') was married to the first defendant. The first defendant and Mohan were however, separated about 20 years before Mohan's demise. They both had a daughter from their marriage. These facts are not in dispute. Prior to his death, Mohan lived alone. He had lived in a house situated on the property, which was registered in his name. Prior to his death, Mohan had executed a will and bequeathed the property to the plaintiff. After Mohan passed away, the plaintiff submitted an application for a grant of probate at the High Court which was granted. However, the grant of probate could not be issued as the first defendant had made an application for a letter of administration pertaining to the property. The first defendant was apparently successful and had transferred the property to her name. The plaintiff alleged that the first defendant had acted fraudulently. In this suit, the plaintiff sought to have the property transferred to his name, and for the distribution order made pursuant to the first defendant's application for letters of administration be revoked. The first defendant denied the existence of a will made by the deceased and contended that Mohan would have informed her and her daughter had he made a will. The first defendant took the stand that her actions in getting the letters of administration and subsequently transferring the property to her name were legitimate. The issue that arose for determination was whether the plaintiff's right over the property prevailed over the first defendant.

Held, allowing the claim with costs of RM10,000:

(1) Neither the first defendant nor his counsel were present during the trial. The court proceed with the trial as opposed to giving judgment in favour of the plaintiff, pursuant to O 35 r 1(2) of the Rules of Court 2012. Although the court was empowered to enter judgment without trial, this

power should be exercised with caution. Although our litigation system is adversarial and not inquisitorial, it is incumbent upon the court to ensure that any orders that it grants are just, and within the ambits of the law (see paras 30–31).

(2) In the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion. The plaintiff had established his case. His claim was premised on the will made by Mohan. The will stated just that, in that the property was to be bequeathed to the plaintiff. The testimony by the defendants that Mohan desired to bequeath the property to the plaintiff lend credence to the plaintiff's contention (see paras 35–36).

(3) The plaintiff had also proven that the first defendant had acted fraudulently in proceeding to obtain the letters of administration to acquire the property. This is due to the fact that the plaintiff had during the prayers ceremony, informed her of the existence of the will, and also of Mohan's wish to gift the property to the plaintiff. In the absence of any challenge or contradiction by the first or second defendant, the evidence put forward by the plaintiff stood unchallenged (see para 37).

[Bahasa Malaysia summary

Plaintif adalah anak saudara defendan pertama. Si mati, bapa saudaranya ('Mohan') berkahwin dengan defendan pertama. Defendan pertama dan Mohan walau bagaimanapun berpisah lebih kurang 20 tahun sebelum kematian Mohan. Kedua-dua mereka mempunyai anak perempuan daripada perkahwinan mereka. Fakta ini tidak dipertikaikan. Sebelum kematiannya, Mohan tinggal bersendirian. Dia tinggal di rumah yang terletak di atas hartanah, yang didaftarkan atas namanya. Sebelum kematiannya, Mohan telah menyempurnakan wasiat dan mewasiatkan hartanah tersebut kepada plaintif. Selepas Mohan meninggal dunia, plaintif memasukkan permohonan untuk pemberian probet di Mahkamah Tinggi yang dibenarkan. Walau bagaimanapun, pemberian probet tidak dapat dikeluarkan kerana defendan pertama telah membuat permohonan untuk surat pentadbiran berkaitan hartanah tersebut. Defendan pertama jelas berjaya dan memindahkan hartanah tersebut kepada namanya. Plaintif mendakwa bahawa defendan pertama telah bertindak secara fraud. Dalam tindakan ini, plaintif memohon untuk hartanah tersebut dipindahkan kepada namanya, dan untuk perintah pembahagian dibuat berikutan permohonan defendan pertama untuk surat pentadbiran dibatalkan. Defendan pertama menafikan kewujudan wasiat yang dibuat oleh si mati dan berhujah bahawa Mohan akan memberitahunya dan anak perempuannya sekiranya dia membuat wasiat. Defendan pertama berpendirian bahawa tindakannya dalam mendapatkan surat pentadbiran dan kemudiannya memindahkan hartanah tersebut kepada namanya adalah sah.

Isu yang berbangkit untuk penentuan adalah sama ada hak plaintif ke atas tanah mengatasi ke atas defendan pertama.

Diputuskan, membenarkan tuntutan dengan kos sebanyak RM10,000:

(1) Defendan pertama ataupun peguamnya tidak hadir semasa perbicaraan. Mahkamah meneruskan dengan perbicaraan bertentangan daripada memberi penghakiman memihak plaintif, berikutan O 35 r 1(2) Kaedah-Kaedah Mahkamah 2012. Walaupun mahkamah diberikan kuasa untuk memasukkan penghakiman tanpa perbicaraan, kuasa ini patut dilaksanakan dengan berhati-hati. Walaupun sistem litigasi kita adalah adversarial dan bukan penyiasatan, adalah wajib ke atas mahkamah untuk memastikan bahawa apa-apa perintah yang diberikannya adalah adil, dan dalam lingkungan undang-undang (lihat perenggan 30–31).

(2) Dalam pelaksanaan budi bicara kehakiman yang betul hakim tidak patut membuat perintah sedemikian seperti akan menewaskan hak pihak dan memusnahkan kesemuanya, kecuali beliau berpuas hati yang beliau telah bersalah terhadap tingkah laku sedemikian bahawa keadilan hanya dapat dilakukan dengan betul kepada pihak lain dengan membuat keputusan sedemikian. Plaintif telah membuktikan kesnya. Tuntutannya adalah didasarkan atas wasiat yang dibuat oleh Mohan. Wasiat menyatakan sedemikian, di mana hartanah tersebut diwasiatkan kepada plaintif. Keterangan oleh defendan-defendan bahawa Mohan ingin mewasiatkan hartanah tersebut membuktikan kebenaran kepada hujahan plaintif (lihat perenggan 35–36).

(3) Plaintif juga telah membuktikan bahawa defendan pertama telah bertindak secara fraud dalam meneruskan untuk mendapatkan surat pentadbiran untuk mengambil alih hartanah tersebut. Ini adalah akibat kepada fakta bahawa plaintif semasa majlis doa selamat, memberitahu defendan pertama mengenai kewujudan wasiat tersebut, dan juga keinginan Mohan untuk memberi hartanah tersebut kepada plaintif. Dalam ketiadaan apa-apa bantahan atau percanggahan oleh defendan pertama atau kedua, keterangan yang dikemukakan oleh plaintif tidak ditentang (lihat perenggan 37).]

Notes

For cases on administration action, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 1819–1820.

Cases referred to

Barker v Furlong [1891] 2 Ch 172 (refd)

Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam [2010] 4 MLJ 842, HC (refd)

Lee Ah Tee v Ong Tiow Pheng & Ors [1984] 1 MLJ 107, FC (refd)
Liew Geok Lan v John Loh [1993] MLJU 301, HC (refd)
Maxwell v Keun [1928] 1 KB 645, CA (refd)
Pernec Ebiz Sdn Bhd v CCI Technology Sdn Bhd & Ors [2015] 2 MLJ 117, CA (refd)
Takako Sakao (f) v Ng Pek Yuen [2009] 6 MLJ 751, FC (refd)
Tenaga Nasional Berhad v Prorak Sdn Bhd [2000] 1 MLJ 479, CA (refd)

Legislation referred to

Rules of Court 2012 O 34 r 1(3)
Small Estates Distribution Act 1955 s 8

Robert S Gnanarajan (Tharmalingam Karuppannan with him) (Robert & Assoc) for the plaintiff.
Teoh Chin Chong (Assistant State Legal Advisor for the State of Perak) for the defendant.

Mohamed Zaini Mazlan JC:

INTRODUCTION

[1] When this suit came up for trial on the 15 April 2015, the first defendant was not present, and nor was her counsel. The second defendant's counsel was however present. The trial proceeded with the plaintiff's witnesses giving evidence.

[2] At the conclusion of the trial, counsel for the plaintiff and the second defendant were directed to submit written submissions.

[3] I had after considering the evidence presented and the written submissions by the plaintiff and second defendant, allowed the plaintiff's claim with costs of RM10,000.

THE PLAINTIFF'S CASE

[4] The subject matter of this suit is a property described as HS (M) 1006, PT 2152 (now known as Geran Mukim No 6425, Lot 10788), Mukim Kota Lama Kiri, Daerah Kuala Kangsar, Perak ('the property').

[5] The plaintiff is the first defendant's nephew. His uncle was the late Mohan Singh a/l Letchaman Singh ('Mohan'), who was married to the first defendant. Mohan had passed away on the 14 February 2012. The first defendant and Mohan were however, separated about twenty years before

Mohan's demise. They both had a daughter from their marriage. These facts are not in dispute.

[6] Prior to his death, Mohan lived alone. He had lived in a house situated on the property, which was registered in his name. It was the plaintiff's mother that took care and supported the deceased prior to his demise. She was after all Mohan's sister. Like his mother, the plaintiff too was close to Mohan.

[7] Prior to his death, Mohan had executed a will dated 23 October 2009. In that will, Mohan bequeathed the property to the plaintiff.

[8] After Mohan passed away, the plaintiff submitted an application for a grant of probate. This application was filed in the Taiping High Court, and was granted on the 7 June 2012. However, the plaintiff soon learned that the grant of probate could not be issued, as the first defendant had made an application for a letter of administration pertaining to the property. The first defendant was apparently successful, and had even transferred the property to her name.

[9] The plaintiff alleged that the first defendant had acted fraudulently, as she had failed to disclose the existence of the deceased's will. He claimed that she knew of the will, and that Mohan had bequeathed the property to him. In this suit, the plaintiff sought to have the property transferred to his name, and for the distribution order made pursuant to the first defendant's application for letters of administration be revoked.

THE DEFENDANTS' CASE

[10] In gist, the first defendant denied the existence of a will made by the deceased, and contended that Mohan would have informed her and her daughter had he made a will. The first defendant took the stand that her actions in getting the letters of administration and subsequently transferring the property to her name were legitimate.

[11] The second defendant had in its defence, affirmed the fact that the first defendant had made an application for the letters of administration, and that no mention was made of the existence of Mohan's will during the hearing. The second defendant takes a neutral stand, and will abide by any decision made by this court.

PRE-TRIAL

[12] In light of the fact that the first defendant and her counsel were not present during the trial, it is necessary for me to set out in brief the events prior to the trial.

[13] My predecessor had already scheduled this suit for trial from the 15 to 16 April 2014. These dates were apparently the second trial dates, as this suit had previously been fixed for trial on the 10 to 11 November 2014. Both trial dates were however vacated, as the parties had not filed any issues to be tried, agreed facts, bundle of documents and witness statements. From the court's notes, I noted that this suit had since been fixed for a number of case management before the learned deputy registrar. I also noted that there had been a history of non-compliance on the directions given by the learned deputy registrar.

[14] I had when taking over conduct of this suit, fixed case management on the 30 March 2015. On that day, only the plaintiff's counsel turned up. I then gave directions for parties to file the agreed facts, issues to be tried, bundle of documents and witness statements, and adjourned the suit for a further case management on the 2 April 2015.

[15] On the 2 April 2015, only the plaintiff and second defendant's counsel turned up. None of the directives that I had given were carried out. The plaintiff's counsel informed me that the plaintiff's solicitors were unable to finalise them, as they have not been getting any response from the first defendant's solicitors. Not wanting to act in haste, I adjourned the case management to the 13 April 2015, to enable parties to comply with the directives that I had given. I then gave an unless order in accordance with O 34 r 1(3) of the Rules of Court 2012 ('the ROC'), where failure by any party to comply, could result in either judgment being entered against the defendants, or the plaintiff's claim dismissed.

[16] Come the case management on the 13 April 2015, again only the plaintiff and second defendant's counsel were present. They had complied with the directives given. However, the agreed facts and issues to be tried, although filed, were not signed by the first defendant's solicitors. I was informed that the first defendant's solicitors had still not given any response.

[17] Acting in abundance of caution, I exercised my discretion and decided not to enter judgment against the first defendant, in view of the fact this suit was already scheduled for trial in two days.

THE TRIAL

[18] On the day of the trial, four witnesses gave evidence for the plaintiff. The first was Kamal Mihad bin Md Dai ('Kamal'), an assistant director at the Perak branch of the Director General of Lands and Mines department.

[19] Kamal had presided over the hearing for the distribution of Mohan's

assets pursuant to s 8 of the Small Estates Distribution Act 1955. The hearing was held on the 24 July 2012. According to Kamal, the first defendant was in attendance together with two others. The two other persons were Mohan's ex-colleagues. These ex-colleagues testified that Mohan had only married once and has a daughter.

[20] Kamal had in his witness statement also stated that the first defendant gave evidence of her marriage to Mohan and produced Mohan's death certificate. The first defendant had also claimed that she was the sole beneficiary, as Mohan's parents had already passed away. Her daughter had also given a letter relinquishing her rights over the property. The end result was that the first defendant was successful, and subsequently transferred the property to her name.

[21] The second witness for the plaintiff was his uncle, Gurmit Singh a/l Latchman Singh ('Gurmit'). In his witness statement, Gurmit stated that Mohan had informed him a few times that he made a will, and that he had in that will, bequeathed the property to the plaintiff. Gurmit also stated that Mohan and the first defendant had been separated twenty years ago, and that Mohan never got to meet his daughter, as the first defendant had prevented him.

[22] Gurmit also testified that the first defendant did attend the prayers ceremony after Mohan's funeral, which was held on the 26 February 2012. Gurmit claimed that he had on that occasion, informed the first defendant of the property, and that Mohan had bequeathed it to the plaintiff. Gurmit had also at the request of the first defendant, showed her the property after the prayers ceremony ended.

[23] The third witness was Manmon Singh a/l Piara Singh ('Manmon'), a treasurer for the Gudwara Committee of Kuala Kangsar. He was a close friend of Mohan. Manmon's testimony was similar to Gurmit's. In addition, Manmon also testified that the plaintiff and his mother had taken care of the plaintiff after he had been separated from the first defendant, and that the plaintiff was close to Mohan.

[24] The final witness was the plaintiff himself. The plaintiff had in his witness statement, stated that Mohan had around two to three years before his demise, asked for a copy of his identity card, as he wanted to make a will. He had informed the plaintiff that he wished to bequeath the property to the latter. A few days later, Mohan gave the plaintiff a sealed envelope containing the will, and confirmed that he had bequeathed the property to the plaintiff in his will. Mohan then asked the plaintiff to hand over the sealed envelope to a firm of

solicitors called Messrs Toh Tham Hock & Co in Kuala Kangsar upon his death.

[25] Upon Mohan's demise, the plaintiff appointed another firm in Taiping called Messrs Manjit, Subra & Assoc, as they could not locate the firm that Mohan had suggested. The plaintiff's appointed solicitors proceeded to make an application at the Taiping High Court for a grant of probate. The deputy registrar subsequently heard the application, and an order in terms were granted.

[26] However, the plaintiff was subsequently informed by his solicitors that the court could not issue the grant of probate, due to the fact that a letter of administration had already been obtained by the first defendant for the property, and hence this suit.

[27] None of the witnesses for the plaintiff were cross-examined by the second defendant's counsel. This was not odd, considering the fact that the second defendant had no interest in the subject matter, and will only abide by any decisions made by this court. The plaintiff then closed his case.

[28] I had at the conclusion of the trial, directed parties to submit their written submissions, which were duly done.

ISSUES AND FINDING

[29] The issue is quite simply whether the plaintiff's right over the property prevails over the first defendant.

[30] I had earlier mentioned that neither the first defendant nor his counsel were present during the trial. Pursuant to O 35 r 1(2) of the ROC, I opted to proceed with the trial as opposed to giving judgment in favour of the plaintiff; *Tenaga Nasional Berhad v Prorak Sdn Bhd* [2000] 1 MLJ 479.

[31] Although the court is empowered to enter judgment without trial, I take the view that this power should be exercised with caution. Although our litigation system is adversarial and not inquisitorial, it is incumbent upon the court to ensure that any orders that it grants are just, and within the ambits of the law.

[32] In the case of *Pernec Ebiz Sdn Bhd v CCI Technology Sdn Bhd & Ors* [2015] 2 MLJ 117, the Court of Appeal had this to say:

> To ensure that the court can identify what evidence put before it is safe to rely upon as basis for findings on disputed facts, the parties in litigation should use the

> available processes of discovery and production, and of interrogatories to enable them to have the opportunity to check and verify the evidence relied upon on disputed facts. It transforms the decisions that the courts can deliver from being the inherently unsatisfactory decisions based upon choosing which version to accept, to decisions fit to be termed judicial decisions, that are logically reasoned application of law to facts and evidence that had been checked and verified to be safe to rely upon. We hold that while the litigation process leaves it to the parties to choose what cause of action and facts to rely upon, and thus on the face of it appear to be adversarial, justice itself is not.

[33] The plaintiff here still bears the burden of proving his claim, and will need to adduce evidence for the court's consideration; see *Barker v Furlong* [1891] 2 Ch 172 (179) and *Liew Geok Lan v John Loh* [1993] MLJU 301. Unless the evidence is inherently incredible or evidence to the contrary is given, the court must accept it; *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 (FC); *Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam* [2010] 4 MLJ 842 (HC).

[34] Furthermore, the second defendant's counsel was present. Even though the second defendant was not adverse to any order being given in favour of the plaintiff, it should still be given the benefit of participating in the trial.

[35] I was also satisfied that ample notice and opportunity had been given to the first defendant. The facts evince that the first defendant had been quite lackadaisical, and I see no reason to accommodate the first defendant any further. The Federal Court had in case of *Lee Ah Tee v Ong Tiow Pheng & Ors* [1984] 1 MLJ 107, cited with approval Atkin LJ's dicta in the case of *Maxwell v Keun* [1928] 1 KB 645, where he said:

> In the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion.

[36] I had considered the evidence adduced by the plaintiff, and in particular Mohan's will. The conclusion is that the plaintiff has established his case. His claim was premised on the will made by Mohan. The will stated just that, in that the property was to be bequeathed to the plaintiff. The testimony by Gurmit and Manmon that Mohan desired to bequeath the property to the plaintiff lends credence to the plaintiff's contention.

[37] The plaintiff had also proven that the first defendant had acted fraudulently in proceeding to obtain the letters of administration to acquire the property. This is due to the fact that Gurmit and the plaintiff himself had during the prayers ceremony, informed her of the existence of the will, and also

of Mohan's wish to gift the property to the plaintiff. In the absence of any challenge or contradiction by the first or second defendant, the evidence put forward by the plaintiff stood unchallenged.

[38] The facts of this case and the proceedings at trial are similar to that in that case of *Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam*. Harminder Singh JC (as he then was) revoked the letters of administration that was issued to the defendant on the basis that the defendant had obtained it by making a misrepresentation. On the same token, I also hold that the first defendant here had clearly misrepresented the facts during the hearing of her application for letters of administration.

[39] The plaintiff's claim is therefore allowed, and the first defendant is ordered to pay costs of RM10,000 to the plaintiff. I make no order as to costs in respect of the second defendant.

Claim allowed with costs of RM10,000.

Reported by Afiq Mohamad Noor